IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.62 OF 2000

Shri. Ramkrishna Bapu Kotkar,
son of Shri. Bapu Kotkar,
major of age, married,
Agriculturist, resident of
Kotkarwada,
Pernem – Goa. ...Appellant/Defendant

V e r s u s

Shri. Namdeo alias Narayan
Nagesh Kotkar, son of Shri.
Nagesh Kotkar, major of age,
contractor, resident of
Kotkarwado,
Pernem – Goa. ...Respondent/Plaintiff

Mr. J. P. Mulgaonkar, Advocate for the appellant.

Mr. P. S. Rao, Advocate for the respondent.

CORAM: N. A. BRITTO,J.

DATE : 30th September, 2005

ORAL JUDGMENT

This is defendant's second appeal arising from Reg. Civil Suit no.333/85/C and was admitted by this Court on 28.9.2000 on substantial questions of law which are as follows:

(a) Whether the learned Appellate Judge erred in discarding the evidence of Dw.1 Dayanand Kotkar on the

ground that the constituted attorney cannot depose on oath in capacity of the party on defendant's behalf?

(b) Whether the learned Appellate Court committed error in holding that the testimony given by Dw.1 was to be taken as the deposition of the witness and that there was no evidence of defendant except his witnesses?

© Whether the learned Additional District Judge proceeded on the proposition that the Revenue records did not create any title and they are meant only for declaration for fiscal parties, committed error by recording the finding that the plaintiff and the defendant were co-owners on the basis of entries in survey records?

2. Briefly stated, the plaintiff claiming to be the co-owner alongwith the defendant and other Kotkars in respect of the property known as 'Kotkar Bhatle' surveyed under no.420/1

filed a suit for permanent and mandatory injunction against the defendant to restrain the defendant from doing any construction in the suit property or in place of a hut within 3 metres from the northern or any other wall of the house of the plaintiff, on the allegation that the defendant somewhere in the year 1983 had forcibly raised a hut on the northern side of the house of the plaintiff and at a distance of about one metre from the plaintiff's northern wall.

3. As far as the first two substantial questions of law are concerned, the same did not at all arise in the suit and in fact are not required to be decided. It is well settled now that a question of law to be substantial question of law, it must be debatable, not previously settled by the law of the land or a binding precedent and should be such that answer to it would have a material bearing as to the rights of parties before the Court and must have a foundation for it laid in the pleadings and the question should emerge from sustainable findings of fact arrived at by the Court of fact and it must be necessary to decide that question of law for a just and proper decision between the parties. (See Govindaraju v. Mariamman((2005) 2 SCC 500)). The defendant had deposed in the suit through his son, as his

attorney the former having given to the latter a power of attorney to give evidence on his behalf and the latter was otherwise conversant with the facts of the case. The learned First Appellate Court had rightly observed that the admissions of the son of appellant(plaintiff) demolished the case of the appellant. Indeed the defendant through his attorney admitted that the suit hut was demolished by the Authorities thrice and as stated by the plaintiff first, upon orders passed on applications filed by plaintiff dated 31.3.83 (Exh.Pw.1/G), complaint dated 26.10.84(Exh.Pw.1/I) and complaint dated 26.10.84 (Exh.Pw.1/J). After the hut was demolished, the defendant obtained a licence from the Administrator of the Village Panchayat, Pernem dated 27.5.85 for the construction of a temporary shed which was granted to the defendant after the defendant submitted no objection from some of the co-owners of the said property. Pursuant to the said licence, the defendant constructed a 3 x 3 metres hut on or about 23.9.85 and after the institution of the suit, the defendant extended the same on two occasions and started tying his buffaloes in the said shed. Once it was admitted by the defendant through his attorney that the said hut was demolished by the Authorities on three occasions and that he had built the same after a gap of about a month with

a licence from the said Administrator, it was but obvious that the plaintiff had succeeded in proving his allegation that the defendant had constructed the said hut as pleaded by him in the year 1983 or thereabout. In the light of that the learned trial Court had held Issue no.1 as proved and Issue no.7 which contained the plea of the defendant that the suit hut was existing for over 50 years as not proved. In view of this position it was hardly necessary for the learned Additional District Judge to have found out whether the defendant's son, the attorney could depose in the suit on behalf of the defendant or not. It appears that the facts stated by the defendant's attorney were to his knowledge as well. In any event, as already observed whether the attorney could depose on behalf of the defendant was not at all a matter which was required to be decided in the said suit.

4. As regards question © it may be stated that the plaintiff had filed the suit on the allegation that the plaintiff was the co-owner of the suit property alongwith the defendant. It is true that at one time many of the co-owners of the said property had a dispute with the temple Committee and the name of the plaintiff as well as the defendant came to be recorded in the

survey records, subsequently. It is also true that both the parties did not produce documents regarding their respective co-ownership and in fact the plea of co-ownership in relation to the suit property set up by the plaintiff was not seriously denied by the defendant. On behalf of the defendant, Shri Mulgaonkar has pointed out a statement in the evidence of the plaintiff that the mango trees, coconut trees and jackfruit trees in the suit property were being enjoyed separately and cultivated individually. At the most, that might have been an arrangement between the plaintiff, the defendant and the other co-owners to enjoy the suit property. It was not the case of the defendant that the place where the suit hut was erected was situated in a portion which was exclusively enjoyed by him or for that matter in relation to which he had acquired rights of ownership adversely as against the other co-owners including the plaintiff. The learned Additional District Judge might have not been right in observing that a co-occupant as recorded on survey records is synonymous with a co-owner of the property. In fact the learned Additional District Judge has not affirmed the judgment of the trial Court solely on the basis that the plaintiff and the defendant were co-owners because their names were entered as co-occupants in the survey records. As already stated the

plaintiff had set up a very clear plea that the plaintiff was a co-owner in respect of the suit property alongwith the defendant and other Kotkars. The defendant has not set up any other plea and therefore the learned trial Court as well as the First Appellate Court were fully justified in coming to the conclusion that the defendant as a co-owner could not construct the said hut without the consent of other co-owners including the plaintiff. In fact the learned trial Court had rightly observed that the defendant had admitted the plaintiff to be as a co-owner in proceedings which the co-owners of the property were having with the Devasthan Committee. The Additional District Judge relied on the case of **Jose Caetano Vaz v. Julia Fernandes(AIR 1969 Goa 90)**wherein the then Court of the Judicial Commissioner had held that a co-owner in possession of a joint property had no right to change the user of the property without the consent of other co-owners. Shri Rao has now placed reliance on the decision of this Court in the case of **Datta Naik v. Damodar Naik(2003(1) Goa L.T. 24)**. In case of co-owners, the possession of one is in law possession of all, unless ouster or exclusion is proved. The defendant, as co-owner was therefore not entitled to change the user of the property by erecting a hut/cattle shed of his own without the consent of other co-

owners including the plaintiff.

5. In view of the above, all the three substantial questions of law have got to be answered against the defendant. The appeal fails and consequently the same is hereby dismissed.

N. A. BRITTO,J.

/vpf.